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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-725

EUGENE LAGANA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Statement and Synopsis

The petitioner Eugene Lagana was indicted in the Supreme Court of the State of New York, County of Kings, for the crime of Murder. Following a trial by jury, he was convicted of the crime of Manslaughter in the First Degree by a judgment entered February 1, 1973 and sentenced to a term of imprisonment not to exceed 25 years. On initial appeal to the Supreme Court of the State of New York, Appellate Division, Second Department, the conviction was reversed and the indictment dismissed. *People* v. *Lagana*, 43 A D 2d 834. Upon appeal by the People to the Court of Appeals of the State of New York, that court reversed the decision of the intermediate appellate court and remitted the case for further determination of the facts.

(Criminal Procedure Law § 470.40[2][b] § 470.25[2][b]); *People* v. *Lagana*, 36 N Y 2d 71. Acting upon the remittitur, the Appellate Division, Second Department affirmed the conviction in an order entered June 10, 1975. *People* v. *Lagana*, —— A D 2d —— . Leave to appeal to the Court of Appeals of the State of New York from this affirmance by the Appellate Division was denied on August 25, 1975, by Hon. Jacob D. Fuchsberg, Associate Judge. Copies of the opinions and orders of the New York courts are set forth in the appendix submitted by petitioner.

Jurisdiction

The jurisdiction of this Court is invoked "under Title 28, United States Code, Section 1257(2) and Rule 19 subdivision 1 of the Rules of this court." (Petition, p. 4.)

Petitioner claims, in substance, that upon his trial, the evidence regarding his identification was admitted, although the procedures utilized to obtain the identification were unconstitutional. He further claims that the manner of proof, authorized by Section 60.25 of the Criminal Procedure Law of the State of New York, was *ex post facto* as the effective date of the statute was subsequent to the date of the indictment but before trial, and thus in violation of his right to due process of law.

Summary of the Facts

The evidence viewed in the light most favorable to the People, *People* v. *Benzinger*, 36 N Y 2d 29; *People* v. *Cleague*, 22 N Y 2d 363, established the following:

On the evening of August 2, 1970, and into the early morning of August 3rd, several friends, including the de-

ceased Joey Pendolino and the witness Margaret Zaccario, were at the Revelation Club in Brooklyn. During the course of the evening, the petitioner and Pendolino had a fight inside the club. Petitioner left with blood on his face. Shortly thereafter, Pendolino was shot to death in front of the club.

At the time of the shooting, petitioner was standing between two parked cars with his hand extended. Although no one could testify that petitioner fired the fatal shots, one witness did testify that the shots appeared to be coming from the man whose arm was extended. Six shots were fired.

After the shots were fired, petitioner re-entered his automobile and drove off at a high rate of speed. Following an extensive chase and search, he was found bleeding and unconscious underneath another automobile.

On the route of escape a pistol was found. It had been fired six times. The pistol marked its bullets in an identical fashion to bullets extracted from the deceased. However, no ballistics expert could testify that this was, in fact, the murder weapon.

There is no testimony that anyone present at the scene, other than the petitioner, engaged in any conduct whatsoever which would indicate their guilt or complicity.

The Identification

As the questions presented in this petition for a writ of certiorari concern the identification, the testimony given at the *Wade* hearing and at the trial concerning identification are synopsized herein as follows:

Prior to trial, a *Wade* hearing was begun. It was subsequently reopened during the course of the trial. The testimony of both parts of the hearing is summarized:

MARGARET ZACCARIO was present with friends, including the deceased, at the discotheque Revelation on Sunday night, August 2, 1970. Another man approached their group and a fight ensued between Pendolino and him. She believes this man was the same man who had also approached earlier in the evening.

The next day, Monday, she went with a Detective O'Brien to Coney Island Hospital where she thinks she identified a man lying in bed as the man who could have started the fight at the Revelation. She thereafter learned the name of this man to be Eugene Lagana.

Miss Zaccario could not identify petitioner in court as the incident occurred two and one-half years before her appearance.

However, she had given a stenographically recorded statement to the District Attorney's office on August 10, 1970, which statement was used to refresh her recollection as to the hospital identification. Although the statement revealed a definite identification of a patient as "the man that was cut," the witness was unable to better recall her identification for the hearing, and in fact, the witness could not identify petitioner as the man in the fight at the time of her testimony. Nonetheless, she affirmed, in response to a question posed by the Court, that in the hospital, she "identified him (petitioner) as the man fighting with Joey." Prior to going to the hospital, the witness was told that she was being taken there because the police had apprehended the man they thought had done the shooting.

DETECTIVE WARREN O'BRIEN was the police officer who accompanied Margaret Zaccario to Coney Island Hospital. He told her that they were going to the hospital for a possible identification. They went to Ward 7W where there were approximately six males patients. Miss Zaccario

walked through the ward, returned to the entrance and said the man in the fight was in the second bed. O'Brien identified that man in court as the petitioner. O'Brien had never seen petitioner before the hospital encounter, and he did not know which of the patients he was.

The court dictated its findings of fact and conclusions of law relative to the *Wade* hearing at pages 150-156 of the minutes of trial, concluding that Zaccario's identification of petitioner in the hospital was made to O'Brien and was not tainted nor made pursuant to suggestion. Accordingly, the court ruled that the identification was admissible.

The Identification at Trial

WARREN O'BRIEN was the detective assigned to investigate the shooting at the Revelation Club. At about 3:15 a.m., he went with Margaret Zaccario to Ward 7W at Coney Island Hospital. Miss Zaccario walked through the ward and then identified a patient there as the man she had earlier seen in an altercation at the club. That man was Eugene Lagana, whom O'Brien identified in court.

On cross-examination, O'Brien stated that he did not know petitioner at the time of the hospital identification. He told Miss Zaccario they were going to the hospital to make an identification of the man who had fought with Pendolino.

Petitioner was in the ward with six or seven patients. There were police officers around; one was approximately six feet away from petitioner's bed. However, the officer was outside the ward by the entrance and closer to a bed occupied by someone other than petitioner, who was the only patient with bandages on his face.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

POINT I

The identification procedures utilized by the prosecution did not deprive the petitioner of any constitutional protections.

The petitioner alleges that the circumstances under which he was identified were violative of his constitutional rights. We respectfully submit that the contention is totally without merit. The trial court in admitting the evidence of the identification found it to be constitutional. The court specifically found that the identification of petitioner by Zaccario in the hospital was untainted and such identification was not based upon any suggestion made to her by the police. There is ample support for such findings in the record. There were six patients in the ward; no one pointed out petitioner. Indeed, Detective O'Brien had never seen petitioner before and therefore could not have pointed him out. The fact that Zaccario was told that she was being taken to the hospital to make an identification or even that the police had apprehended the man that they thought had done the shooting does not in any way suggest that petitioner was that man. Zaccario had seen a "blob of blood" on petitioner's face. She did not see his face cut. The blood on the face could have come from a wound to the head or shoulder. Thus, the fact that the face was bandaged was not suggestive. The identification in the hospital ward was not improperly suggestive nor conducive to a mistake (*United States* v. *Wade,* 338 U.S. 226). The identification occurred at approximately 3:15 a.m., an hour and a half after the shooting. It was the result of "rapid and effective police work." *Cf. People* v. *Peacock,* 37 A D 2d 999, concurring opinion of Shapiro, J., where the witness viewed defendant and his alleged

accomplice through a one-way mirror at a precinct an hour and a half after the robbery. See, also *People* v. *Brown*, 20 N Y 2d 238.

We submit, therefore, that the hospital identification was fully consonant with constitutional requirements. Of equal importance is the fact that, in this particular case, no possibility of an irreparable misidentification exists. The identity of the petitioner as the person engaged in the fight at the Revelation Club was established by his own witness Nicholas Conte. The petitioner's only witness testified that sometime after 12 o'clock on the night of the homicide, he heard a commotion, went into the corridor of the club and saw petitioner being helped off the floor. Petitioner's face was bleeding. When the witness walked outside, he saw the petitioner walking towards the building, and although he denied that the petitioner had a gun in his hand, he further testified that the petitioner got back into his car after the shots were fired. The testimony of Margaret Zaccario and Detective O'Brien merely add to this fact established by the petitioner's own case.

When an identification is clearly established, a new trial is not required where "the identification procedure employed may have in some respects fallen short of the ideal." *Simmons* v. *United States*, 390 U.S. 377. Indeed, the majority opinion in *Neil* v. *Biggers*, 409 U.S. 188 (1972), implied that it is not the denial of fundamental fairness, for example, one on one identifications or delays, but instead, "it is the likelihood of misidentification which violates a defendant's right to due process." 409 U.S. at 198, 199. Indeed the majority held that the "central question" was whether "the identification procedure was reliable even though the confrontation procedure was suggestive." (409 U.S. 199.)

We submit that the identification itself was proper. In any event, the identification is irrefutably reliable. There

is no possibility of a misidentification so that the claim may not be proffered that the petitioner's right to due process has been violated.

POINT II

The application of Criminal Procedure Law § 60.25 to petitioner's case was constitutionally permissible.

At petitioner's trial, witness Margaret Zaccario was unable to identify Eugene Lagana. Police Department Detective Warren O'Brien took the stand and stated that he had accompanied Margaret Zaccario to the hospital shortly after the crime. Pursuant to Criminal Procedure Law § 60.25, he testified that at the hospital petitioner was identified by Margaret Zaccario as the man who had a short time before argued with the deceased in the cabaret. Petitioner now asserts that the admission of hearsay * testimony at his trial pursuant to C.P.L. § 60.25 was violative of the constitutional interdiction of *ex post facto* laws because the law became effective after defendant's indictment for the crime. United States Constitution Article I, Section 9. We disagree and respectfully submit that the application of C.P.L. § 60.25 to Eugene Lagana's case was constitutionally permissible.

The constitutional prohibition of *ex post facto* laws is generally said to encompass laws which make acts criminal, which, when committed, were not criminal, and laws which increase the punishment for or increase the grade or seriousness of criminal acts beyond that punishment or grade which existed when the criminal act was committed. See, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *United States* v.

* Technically, petitioner is incorrect when he asserts that Detective O'Brien's testimony was hearsay. The statement, while made out of court, was not admitted to prove the truth of the matters asserted therein.

Henson, 486, F. 2d 1292 (D.C. Cir. 1973); *People ex rel. Lonschein* v. *Warden*, 43 Misc. 2d 109 (Sup. Ct. 1964), *aff'd* 15 N.Y. 2d 663 (1964). The application of C.P.L. § 60.25 to petitioner's case falls within none of these prohibited categories.

Indeed, the challenged § 60.25 of the Criminal Procedure Law simply effectuates a procedural change and thus stands in marked contrast to the prohibited categories. Procedural changes applied to trials arising from crimes committed before their enactment are violative of the *ex post facto* clause of the United States Constitution *only* when they have the effect of requiring less or different testimony for conviction than was necessary when the crime occurred. *Thompson* v. *Missouri*, 171 U.S. 380 (1898); *Hopt* v. *Utah*, 110 U.S. 574 (1884); *Landay* v. *United States*, 108 F. 2d 698 (6th Cir. 1939), *cert. denied* 309 U.S. 681 (1939); *People* v. *Nival*, 33 N.Y. 2d 391 (1974), *cert. denied* 417 U.S. 903 (1974). Thus, the Supreme Court of the United States has upheld a statute which repealed one according a right to separate trials upon demand (*Beazell* v. *Ohio*, 296 U.S. 167 [1925]) and a statute which repealed one preventing convicted felons from testifying (*Hopt* v. *Utah*, 110 U.S. 574 [1884]). Where, as in the present case, the procedural change authorized by statute simply permits the use of evidence which was previously inadmissible at trial, it is equally clear that the rules of evidence have not been altered to require less or different testimony for conviction. Therefore, the application of C.P.L. § 60.25 to petitioner's case should be deemed not violative of the *ex post facto* clause.

The Court of Appeals of New York reached just this conclusion in the recent case of *People* v. *Nival, supra*. In *Nival*, the court rejected appellant's contention that the application of C.P.L. § 60.25 to his trial was constitution-

ally impermissible, ruling that laws making admissible previously excluded testimony are not *ex post facto*. Moreover, our conclusion is buttressed by the decision of this Court in *Thompson* v. *Missouri, supra,* a case in which it was held that a statute authorizing new evidence to be heard was not *ex post facto* as to a defendant charged with a crime committed before the effective date of the statute. The *Thompson* court observed that it was "unable to perceive any ground upon which to hold a statute which does nothing more than admit evidence of a particular kind . . ." constitutionally objectionable. *Id.* at 386-387.

In sum, Criminal Procedure Law § 60.25 was applied to petitioner's case in a manner consistent with the United States Constitution.

CONCLUSION

For the reasons above set forth, the petition for a writ of certiorari should be denied.

Dated: Brooklyn, New York
January, 1976

Respectfully submitted,

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